

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:) ADV. CASE NO. 98-90021-H7
)
Vern D. Blanchard d/b/a) MEMORANDUM DECISION
American Multi-Systems,)
)
Debtor.)
)
Related Bankruptcy Court)
Case No. 96-12037-H7)
_____)
)
Apex Wholesale Inc., Assignee)
of Fortunet, Inc.,)
)
Plaintiff,)
)
v.)
)
)
Vern D. Blanchard d/b/a)
American Multi-Systems,)
)
Defendant.)
_____)

At issue is (1) whether the doctrine of equitable tolling applies to the time limitation for filing a complaint for revocation of discharge set forth in 11 U.S.C. § 727(e)(2); and (2) whether a case can be properly closed under 11 U.S.C. § 350(a)¹ when assets remain unadministered, for purposes of

¹ Unless otherwise indicated all section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

1 applying the time limitation under 11 U.S.C. § 727(e)(2).

2 This Court has jurisdiction to determine this matter
3 pursuant to 28 U.S.C. §§ 1334 and 157(b)(1) and General Order
4 No. 312-D of the United States District Court for the Southern
5 District of California. This is a core proceeding pursuant to
6 28 U.S.C. § 157(b)(2)(J).

7
8 FACTS AND PROCEDURAL BACKGROUND
9

10 On September 7, 1996, debtor Vern D. Blanchard ("Debtor")
11 filed a no-asset Chapter 7 bankruptcy case. On October 9,
12 1996, the Chapter 7 trustee ("Trustee") filed a "Report of No
13 Distribution." On December 20, 1996, this Court granted
14 Debtor's discharge. In early January 1997, Fortunet, Inc., a
15 judgment creditor,² assigned its interest to Apex Wholesale,
16 Inc. ("Apex"). On January 15, 1997, the case was closed.

17 Nearly a year after the Debtor filed his petition, Apex
18 discovered, through filings with the Securities and Exchange
19 Commission ("SEC") associated with the initial public offering
20

21 ² In 1993, Debtor allegedly misappropriated intellectual property
22 owned by Fortunet, Inc. ("Fortunet"). Fortunet is a Nevada corporation
23 engaged in supplying Indian gaming halls with computerized bingo equipment.
24 Debtor and his associates allegedly obtained a complete, fully functional
25 Fortunet computer system from which Debtor then de-compiled and duplicated
26 Fortunet's proprietary software. Debtor, operating through his trust,
27 American Multi-Systems, then installed his 'new' software on computers which
28 were then leased to third party Indian bingo halls. Fortunet filed suit
against Debtor on November 12, 1993. Debtor refused to respond to the court's
discovery orders. The district court imposed default as a discovery sanction.
Fortunet applied for entry of a default judgment on October 6, 1994. Debtor
requested a continuance to hire new counsel. The court granted Debtor a
continuance, but instead of hiring new counsel, Debtor filed a Chapter 7
petition. Debtor later converted the case to Chapter 13 and ultimately
dismissed the case. On November 21, 1995, the district court entered a
default judgment in favor of Fortunet in the amount of \$762,682.87.

1 of stock in GameTech International Inc. ("GameTech"), that
2 Debtor had allegedly not provided full disclosure of his
3 assets. Specifically, Apex allegedly discovered that
4 according to the SEC filings, Debtor was the founder of
5 GameTech, Debtor had received stock options during the
6 pendency of the bankruptcy proceeding,³ and Debtor was the
7 sole trustee of a family trust which owned a significant
8 portion of GameTech.

9 On January 14, 1998, Apex and Fletcher Hills Town &
10 Country ("Town & Country") successfully moved to reopen
11 Debtor's Chapter 7, asserting Debtor fraudulently failed to
12 report his interest in GameTech on his schedules, and
13 simultaneously filed a complaint seeking to revoke Debtor's
14 discharge. Debtor moved to dismiss Apex's complaint seeking
15 revocation of his discharge, asserting the limitations period
16 set forth in § 727(e)(2) had expired. This Court found that
17 the limitations period had expired and dismissed the complaint
18 with prejudice.

19 Apex moved for reconsideration on the ground that
20 equitable tolling should apply to § 727(e)(2). This Court
21 denied Apex's motion for reconsideration. Apex appealed to
22 the district court. The district court affirmed this
23 Court's interpretation of § 727(e)(2). This Court had held
24 that the limitations period of § 727(e)(2) is either the date
25

26 ³ In opposition to Apex's motion to reopen the bankruptcy case,
27 Debtor submitted evidence that his stock options were not finally approved by
28 GameTech's board of directors until the following year. It is unclear whether
the stock options became property of the estate, but the Court makes no
determination in that regard at this time.

1 the case is closed or one year after the date of discharge,
2 whichever occurs later. Specifically, Debtor received his
3 discharge on December 20, 1996 and the case was closed on
4 January 15, 1997. The district court agreed that because one
5 year after the original date of discharge (December 20, 1997)
6 is certainly later than the original date the case was closed
7 (January 15, 1997), it represents the "later" date for
8 purposes of § 727(e)(2), and Apex's adversary proceeding was
9 required to be brought no later than December 20, 1997.

10 The district court remanded the matter, however, for this
11 Court to consider whether equitable tolling applied in light
12 of the intervening decision of In re Peebles, 224 B.R. 519
13 (Bankr. D. Mass. 1998). The Trustee joins in this proceeding.

14 15 DISCUSSION

16
17 Section 727(e)(2) provides the limitations period for
18 revocation of discharge.⁴ Because Apex's revocation claim is
19 barred by the time period set forth in the statute, the only
20 issues are whether equitable tolling applies to § 727(e)(2)
21 and whether Debtor's case was properly closed for purposes of
22 § 727(e)(2)(B).

23
24 ⁴ Section 727(e) provides in relevant part:

25 The trustee, a creditor, or the United States trustee may request
26 a revocation of a discharge-

27 (2) under subsection (d)(2) or (d)(3) of this section before the
later of--

28 (A) one year after the granting of such discharge; and
(B) the date the case is closed.

1
2 A. Equitable Tolling.

3 Apex urges the Court to adopt the rationale set forth in
4 Peebles, 224 B.R. at 519 and In re Succa, 125 B.R. 168 (Bankr.
5 W.D. Texas 1991) which applied the doctrine of equitable
6 tolling to § 727(e)(2) actions. Apex argues that "until
7 Congress makes a clear statement that debtors can play 'hide
8 and seek' with their assets and keep their discharge by
9 waiting for the limitation period to pass, this Court should
10 apply the doctrine of equitable tolling." Debtor relies on In
11 re Johnson, 187 B.R. 984, 986-88 (Bankr. S.D. Cal. 1995) which
12 held that equitable tolling is inapplicable to § 727(e)(2)
13 because the statute was intended by Congress as a statute of
14 repose.

15 This Court finds that Johnson and the line of cases which
16 find equitable tolling inapplicable to § 727(e)(2) are more
17 persuasive. Section 727(e)(2) is a statute of repose and, as
18 such, is not subject to the doctrine of equitable tolling. In
19 support of this conclusion, the Court adopts the rationale set
20 forth in Johnson, 187 B.R. at 986-88, In re Ford, 159 B.R.
21 590, 592-93 (Bankr. D. Oregon 1993), and In re Phillips, 233
22 B.R. 712, 715-18 (Bankr. W.D. Texas 1999).

23 The fact that the limitation period is contained within
24 the text of the statute is indicative that Congress must have
25 intended that a creditor's right to file a complaint seeking
26 the revocation of discharge would terminate on a certain date.
27 See Phillips, 233 B.R. at 716 (the express terms of the
28 statute demonstrate that Congress must not have intended for

1 equitable tolling to apply). The Johnson court noted:

2 The gravamen of the causes of action for
3 revocation of discharge under § 727(d)(1)
4 and (d)(2) are, respectively, that the
5 debtor committed fraud in obtaining the
6 discharge and the plaintiff did not know of
7 the fraud until after the discharge; and
8 that the debtor acquired property of the
9 estate but 'knowingly and fraudulently'
10 failed to report it or surrender it to the
11 trustee. Johnson, 187 B.R. at 986.

12 To find that equitable tolling applies to § 727(e)(2) would
13 effectively "wipe those provisions from the books." Id. at
14 986.

15 Unlike a statute of limitation which begins running upon
16 accrual of the cause of action, the limitation period set
17 forth in § 727(e)(2) sets an outside limit after which,
18 regardless of whether the cause of action has accrued, the
19 cause of action is extinguished.⁵ It is conceivable that the
20 time limitation set forth in § 727(e)(2) may run before the
21 plaintiff discovers that a debtor committed fraud. The result
22 promotes a finality policy that is consistent with a statute

23 ⁵ Statutes of limitations are distinct from statutes of repose.
24 The former generally limits the time for bringing a
25 claim after it accrues, while the latter limits the
26 time during which a claim can accrue in the first
27 place. A statute of repose sets forth a period of
28 repose, a given time span after the defendant's
wrongful act in which a claim must accrue or be
barred. A statute of repose bars a claim not because
the plaintiff brought [its] claim too late, but rather
because [its] injury occurred, and thus [its] claim
accrued too late, after the expiration of the period
of repose.

Eli J. Richardson, Eliminating the Limitations of Limitations Law, 29
ARIZ.ST.L.J. 1015, 1018 (1997) (citations omitted).

1 of repose.⁶

2 In addition, Federal Rule of Bankruptcy Procedure 9024
3 makes clear that Federal Rule of Civil Procedure 60 does not
4 permit the extension of the time allowed by § 727 for the
5 filing of a complaint to revoke a discharge. Johnson, 187
6 B.R. at 987. A leading treatise on bankruptcy has concluded
7 that the time limitation "is not a mere statute of
8 limitations, but an essential prerequisite to the proceeding."
9 Id. (citation omitted); Ford, 159 B.R. at 592 (citation
10 omitted); Phillips, 233 B.R. at 716 (citation omitted).

11 This Court is aware that the doctrine of equitable
12 tolling has been applied in the context of § 546(a) avoidance
13 actions. Johnson, 187 B.R. at 986 (citations omitted);
14 Phillips, 233 B.R. at 717 (citations omitted). However,
15 "equitable tolling is not permissible where it is inconsistent
16 with the text of the relevant statute." Phillips, 233 B.R. at
17 717. Therefore, the Court finds that the cases applying
18 equitable tolling to the time limitation in § 546(a) are
19 unpersuasive in the instant analysis.

20
21 B. Assuming Equitable Tolling Applies to Section
22 727(e)(2)(A), It Would Not Apply Under the Circumstances of
This Case.

23 Assuming equitable tolling applies to § 727(e)(2), the
24 Court finds that the parties would still be barred by the
25 limitations period.
26

27 ⁶ See generally, Francis E. McGovern, The Variety, Policy and
28 Constitutionality of Product Liability Statutes of Repose, 30 AM. U. L. REV.
579, 583 (1981).

1 To establish that equitable tolling
2 applies, a plaintiff must prove the
3 following elements: fraudulent conduct by
4 the defendant resulting in concealment of
5 the operative facts, failure of the
6 plaintiff to discover the operative facts
7 that are the basis of its cause of action
8 within the limitations period, and due
9 diligence by the plaintiff until discovery
10 of those facts. Fed. Election Comm'n. v.
11 Williams, 104 F.3d 237 (9th Cir. 1996).

12 Apex, the Trustee and Town & Country had a period of
13 three months after discovery of GameTech's SEC filings during
14 which to conduct an investigation. The record shows that none
15 of the parties took any steps to investigate. Apex simply
16 filed its motion to reopen the case on January 14, 1998, after
17 the limitations period of § 727(e)(2) expired. Indeed,
18 counsel for Town & Country stated that nothing was done sooner
19 because she "relied upon the Johnson decision which said that
20 [she] had extra time." [Transcript of September 23, 1999,
21 hearing 17:14-16]. Unfortunately, this Court did not
22 interpret the time limitations in § 727(e)(2) the same as the
23 Johnson court.⁷

24 Moreover, Debtor's schedules listed Debtor as the trustee
25 to several family trusts. At the first hearing on this
26 matter, this Court interpreted § 727(e)(2) to mean that "if

27 ⁷ In Johnson, the court found that the action must be filed before
28 the later of one year after the granting of the discharge or the date is
closed. Johnson, 187 B.R. at 986 (emphasis added). Under this Court's
interpretation the complaint for revocation had to be made before the later of
one year after the discharge (December 20, 1997) and the date the case was
closed (January 15, 1997). Because the case had already closed on January 15,
1997, plaintiff had to file its complaint before December 20, 1997 (one year
after the Debtor received his discharge). Under the Johnson court's
interpretation, the complaint for revocation had to be made the later of one
year after the date of discharge (December 20, 1997) or one year after the
date the case is closed (January 15, 1998). Apex filed the motion to reopen
on January 14, 1998.

1 you [creditor] suspect something's wrong, you've got to start
2 conducting your investigation...if you need more time, you can
3 always ask the court not to close the case". [Transcript of
4 May, 13, 1999, hearing 8:6-9]. Debtor's petition was filed on
5 September 7, 1996, and the Trustee filed a report of no
6 distribution on October 9, 1996, after the 341a hearing. The
7 Trustee and creditors had ample opportunity to question Debtor
8 about his position as trustee for the family trusts and what
9 assets those trusts contained. Nonetheless, the Trustee filed
10 a report of no distribution a little over a month after the
11 filing.

12 The facts indicate that Apex discovered GameTech's SEC
13 filing within the limitations period set forth in § 727(e)(2),
14 but failed to investigate or perform any due diligence until
15 it was too late. Therefore, equitable principles do not favor
16 the creditors in this case.

17
18 C. Closing of a Case.

19 Section 350(a) provides that after an estate is fully
20 administered, the court shall close the case. Apex argues
21 that the estate was not properly closed because debtor failed
22 to schedule his interests in GameTech and, therefore, the
23 statute of limitations under § 727(e)(2) did not begin to run
24 until the debtor's fraud was discovered. Apex urges the Court
25 to adopt the view espoused by Peebles, 224 B.R. at 521 and In
26 re Petty, 93 B.R. 211, 212 (9th Cir. BAP 1988), which hold that
27 when unscheduled assets remain unadministered, the case is not
28 properly closed under § 350(a). According to the Peebles

1 court, the word "closed" in § 727(e)(2)(B) must mean properly
2 and finally closed. Therefore, if there are unadministered
3 assets the case could never be properly and finally closed and
4 the statute of limitations would not begin to run. The Court
5 notes that Peebles relied on Petty which involved a § 546(a)
6 action.

7 Debtor argues to the contrary, that Apex's argument would
8 effectively eliminate the need for the one year limitation
9 period set forth in § 727(e)(2)(A).

10 This Court agrees with Debtor. Apex's interpretation
11 would render the one year after the date of discharge
12 limitations period in § 727(e)(2)(A) meaningless. A case
13 could never be closed if there were assets that remained
14 unadministered. Johnson, 187 B.R. at 984; Ford, 159 B.R.
15 at 590.

16
17 D. Apex is Not Without A Remedy.

18 Even though Debtor may receive a discharge, Apex and
19 other creditors may not be left without a remedy. The Trustee
20 may still recover property of the bankruptcy estate, which
21 may, or may not, include Debtor's interest in GameTech.
22 Debtor's discharge does not prohibit the Trustee or creditors
23 from using Debtor's prepetition property to satisfy Debtor's
24 prepetition debts. The Court, however, makes no ruling with
25 respect to this issue at this time.

26
27 CONCLUSION

This Memorandum Decision constitutes findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052. Debtor is directed to file with this Court an order in conformance with this Memorandum Decision within ten (10) days from the date of entry hereof.

Dated: November 5, 1999.

JOHN J. HARGROVE
United States Bankruptcy Judge

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